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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 CHRISTOPHER N. MILLER,
10
11 Petitioner,

12 v.

13 KENNETH QUINN,
14
15 Respondent.

Case No. C06-5694RJB

ORDER ADOPTING REPORT
AND RECOMMENDATION,
DENYING PETITION FOR WRIT
OF HABEAS CORPUS,
DISMISSING CASE WITH
PREJUDICE, AND DENYING A
CERTIFICATE OF
APPEALABILITY

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17 This matter comes before the court on consideration of the Report and Recommendation of the
18 Magistrate Judge. Dkt. 39. The court has considered the relevant documents and the file herein.

19 In this habeas corpus action, U.S. Magistrate Judge J. Richard Creatura recommended that the
20 court deny the two remaining claims at issue in petitioner's habeas petition, following remand from the
21 Ninth Circuit U.S. Court of Appeals. Dkt. 39. *See Miller v. Quinn*, 2009 WL 117985 (C.A.9 (Wash.)).

22 **1. Report and Recommendation**

23 Petitioner's two remaining habeas claims, as set forth by the Ninth Circuit opinion, are as follows:
24 (1) that the due process clause requires that Miller be given access to DNA evidence found on the victim as
25 well as to relevant state and federal DNA databases, and (2) that the prosecutor wrongly induced Miller's
26 confession by giving him misleading advice. *Id.* at *1.

27 The magistrate judge carefully analyzed both claims; the court concurs with that analysis. Further,
28 after the Report and Recommendation was issued, the United States Supreme Court, in *District Attorney's
Office for the Third Judicial District v. Osborne*, 2009 WL 1685601, U.S., June 18, 2009 (No. 08-6), held

1 that there is no constitutional right to obtain post conviction access to the State's evidence for DNA
2 testing. The state court decisions affirming petitioner's conviction were not contrary to or an unreasonable
3 application of clearly established federal law, as determined by the Supreme Court, nor did they result in a
4 decision that was based on an unreasonable determination of the facts in light of the evidence presented to
5 the state courts. The Report and Recommendation should be adopted and the petition for writ of habeas
6 corpus should be denied.

7 **2. Certificate of Appealability**

8 In the event that petitioner files an appeal with the Ninth Circuit, the court should determine
9 whether a Certificate of Appealability is warranted. *See* 28 U.S.C. 2253(c)(3).

10 The district court should grant an application for a Certificate of Appealability only if the petitioner
11 makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). To obtain a
12 Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that
13 reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different
14 manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
15 *McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).


16 Pursuant to this order, the petition for writ of habeas corpus is denied on the merits. Relief on
17 petitioner's first claim, regarding his alleged right to access evidence for DNA testing, is precluded by
18 *District Attorney's Office for the Third Judicial District v. Osborne*, *supra*. Petitioner's second claim,
19 regarding the alleged wrongly induced confession, is without merit. Petitioner has not made a showing
20 that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a
21 different manner or that the issues presented were adequate to deserve encouragement to proceed further.
22 Accordingly, a Certificate of Appealability should be denied.

23 Therefore, it is hereby

24 **ORDERED** that the Report and Recommendation of the Magistrate Judge (Dkt. 39) is
25 **ADOPTED**. The petition for writ of habeas corpus is **DENIED** and the case is **DISMISSED WITH**
26 **PREJUDICE**. A Certificate of Appealability is **DENIED**.
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1 The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record
2 and to any party appearing *pro se* at said party's last known address.

3 DATED this 20th day of July, 2009.

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5 Robert J. Bryan
6 United States District Judge
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